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22 *Incredible Pizza Franchise Group, LLC*

23 UNITED STATES DISTRICT COURT
24 CENTRAL DISTRICT OF CALIFORNIA
25 WESTERN DIVISION

26 JIPC Management, Inc.

27 Plaintiff,

28 v.

Incredible Pizza Co., Inc.; Incredible
Pizza Franchise Group, LLC;

Defendants.

Case No. CV08-04310 MMM (PLAx)

**DEFENDANTS' REPLY IN
SUPPORT OF MOTION IN LIMINE
NO. 11**

Pretrial Conference

Date: July 13, 2009

Time: 9:00 a.m.

Courtroom: Roybal 780

Judge: Hon. Margaret R. Morrow

1 Plaintiff 's Opposition to Motion in Limine No. 11 complains that Defendants'
2 argument "that use of two taglines may have contributed to actual confusion is a 'red
3 herring.'" However, Plaintiff ignores that *its own expert* seized upon this same "red
4 herring," emphasizing the fact that the parties share similar taglines as part of his
5 argument that "[t]here is substantial overlap among the names used by both companies
6 to describe their brand." [Isaacson Initial Report at ¶ 60] Specifically, Isaacson stated:
7 "Both have slogans that invoke food and fun; JIPC uses the slogan 'All You Can Eat
8 Food & Fun' and 'Experience the Incredible,' while IPC uses 'Great Food, Fun, Family
9 & Friends.'" [Id.] Thus, according to Plaintiff's own expert, a noteworthy source of
10 any alleged confusion between the parties is the shared use of similar taglines that
11 "invoke food and fun." The fact that Defendants used a food and fun tagline first
12 establishes that Plaintiff is partially, and materially, responsible for any confusion that
13 allegedly arose after it adopted its similar "food and fun" tagline.

14 Evidence of actual confusion arising after Plaintiff adopted a confusingly similar
15 tagline should be excluded because it would be prejudicial, and would confuse and
16 mislead the jury, even if such evidence was otherwise relevant. As Plaintiff knows, even
17 relevant evidence may be excluded if its probative value is substantially outweighed by
18 the danger of unfair prejudice, confusion of the issues, or misleading the jury. Fed. R.
19 Evid. 403. Plaintiff's Opposition fails to explain how jurors, presented with any evidence
20 of alleged actual confusion arising after Plaintiff adopted what Plaintiff's own expert saw
21 as a confusingly similar tagline, could determine whether such confusion was caused by
22 that tagline or by shared use of the common words "INCREDIBLE PIZZA." Therefore,
23 even if otherwise admissible, this evidence of alleged actual confusion should be deemed
24 inadmissible because it would confuse the jury about the true source of the confusion
25 between the parties.

26 Finally, it is significant to note, albeit in passing, that Plaintiff recognizes in its
27 Opposition that the authorities cited by Defendants stand for the proposition that "a
28 plaintiff may not be able to obtain equitable relief if the plaintiff takes steps to move its

own mark closer to defendant's mark." [Opposition to MIL No. 11 at p.3 (citing *Kendall-Jackson Winery, Ltd. v. ENJ Winery*, 150 F.3d 1042, 1052-53 (9th Cir. 1988)] That is exactly what happened here, if Plaintiff's own expert is to be believed.

Based on the foregoing, the Court should exclude the following evidence of alleged actual confusion that occurred after Plaintiff adopted its food and fun tagline:

Description of Evidence	Found At	Why Plaintiff Seeks to Admit	Why It Should Be Excluded
"Consumer Confusion Correspondence"	Joint Exhibit List (Doc. 206-2), Exh. 58	To establish actual confusion	All of the emails were sent in 2007-09, long after Plaintiff adopted its food & fun tagline
"Confusion Emails and Website Inquiries"	Doc. 206-2, Exh. 195	To establish actual confusion	All of these messages were sent in 2004-09, long after Plaintiff adopted its food & fun tagline
"JIPC Employment Application"	Doc. 206-2, Exh. 196	To establish actual confusion	Application was completed in 2005, long after Plaintiff adopted its food & fun tagline
"Pizza Marketplace News Article on JIPC With Link to IPC Story"	Doc. 206-2, Exh. 198	To establish actual confusion	Article written in 2004, long after Plaintiff adopted its food & fun tagline

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2 Dated: July 6, 2009

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19 Attorneys for Incredible Pizza Co., Inc.
20 and Incredible Pizza Franchise Group,
21 LLC
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1 **PROOF OF SERVICE**

2 **1013 A(3) CCP REVISED 5/1/88**

3 STATE OF ARIZONA, COUNTY OF MARICOPA

4 I am employed in the County of Maricopa, State of Arizona. I am over the age of 18 and not
5 a party to the within action. My business address is 16427 North Scottsdale Road, Suite 300,
6 Scottsdale, Arizona 85254.

7 On July 6, 2009, I served the foregoing document described as **DEFENDANTS'**
8 **REPLY IN SUPPORT OF MOTION IN LIMINE NO. 11** on the interested party in this
9 action by placing a true and correct copy thereof enclosed in a sealed envelope addressed as follows:

10 **SEE ATTACHED SERVICE LIST**

11 ☐ BY MAIL: I am "readily familiar" with the firm's practice of collection and
12 processing correspondence for mailing. Under that practice it would be deposited with U.S. postal
13 service on that same day with postage thereon fully prepaid at Scottsdale, Arizona in the ordinary
14 course of business. I am aware that on motion of the party served, service is presumed invalid if
15 postal cancellation date or postage meter date is more than one day after date of deposit for mailing
16 in affidavit.

17 ☐ BY PERSONAL SERVICE: I caused the above-mentioned document to be
18 personally served to the offices of the addressee.

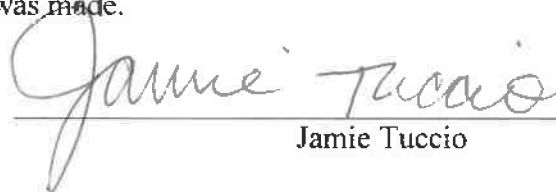
19 ☐ BY FACSIMILE: I communicated such document via facsimile to the
20 addressee as indicated on the attached service list.

21 ☐ BY FEDERAL EXPRESS: I caused said document to be sent via Federal
22 Express to the addressee as indicated on the attached service list.

23 ☒ BY ELECTRONIC MAIL: I caused the above-referenced document to be
24 served to the addressee on the attached service list.

25 Executed on July 6, 2009, at Scottsdale, Arizona.

26 **X** (FEDERAL) I declare that I am employed in the office of a member of the bar
27 of this court at whose direction the service was made.

28 
Jamie Tuccio

SERVICE LIST

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